

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

REPLY COMMENTS OF ITC^DELTACOM COMMUNICATIONS, INC.

Nanette Edwards
Director of Regulatory Affairs
ITC^DeltaCom Communications, Inc.
7037 Old Madison Pike
Suite 400
Huntsville, Alabama 35806

October 19, 2004

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ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), through its attorneys, and pursuant to the Federal Communications Commission ("Commission")'s Order and Notice of Proposed Rulemaking released on August 20, 2004, files its Reply Comments in the above-captioned proceeding. ITC^DeltaCom provides facilities-based local and long distance services throughout the Southeastern United States.

I. SUMMARY

As demonstrated by the comments in this proceeding, the record is replete with evidence that carriers are impaired without access to unbundled network elements ("UNEs") under section 251(c)(3) of the Communications Act of 1934, as amended (the "Act"). Neither BellSouth, in which territory ITC^DeltaCom predominantly operates, nor other Bell Operating Companies ("BOCs") have provided evidence to rebut the fact that competitive local exchange carriers ("CLECs") satisfy the impairment standard under section 251(d) of the Act.

In these comments, ITC^DeltaCom primarily responds to assertions made by BellSouth in its comments.¹ In particular, ITC^DeltaCom demonstrates that BellSouth's proposed batch hot cut process, which has not been tested by real life CLECs, is inadequate. If the Commission relies on

¹ See *Comments of BellSouth Corporation*, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004) ("BellSouth Comments").

BellSouth's hot cut process, however, then it must take steps – such as mandating reporting and requiring state commissions to implement and enforce performance measurements – to ensure that the hot cut process will work on a going-forward basis.

In addition, CLECs also are impaired without access to high capacity loops and transport. In evaluating BellSouth's and other BOCs' claims regarding loops and transport, the Commission cannot rely on the so-called UNE Fact Report.² As demonstrated herein, in compiling that report, the BOCs ignored evidence in the record in the state *Triennial Review Order* proceedings that counters the statements made therein. Lastly, the Commission must require carriers to file so-called commercially negotiated agreements with the applicable state commissions. Those agreements are nothing more than interconnection agreements under a different name.

II. CLECS ENCOUNTER SUBSTANTIAL PROBLEMS CONVERTING FROM UNE-P TO UNE-L OR EELS

A. BellSouth's Batch Hot Cut Process Is Inadequate

There are substantial problems with BellSouth's proposed batch hot cut process that pose real, everyday problems for carriers throughout its service territory. In its comments, BellSouth attempts to demonstrate that CLECs are not impaired as a result of its batch hot cut process. The fact remains that BellSouth's batch hot cut process has not been used in the real world, and even on paper there are substantial and obvious operational problems with BellSouth's process. The Commission cannot ignore these problems.

First, BellSouth's batch hot cut process leaves the end-user customers subject to substantial service disruptions. BellSouth's limit for off-hours work is 75 lines on weekdays and 100 lines on Saturday per central office per CLEC; all other night times are on an individual case

² UNE Fact Report, Peter Huber and Evan Leo (Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.) WC Docket No. 04-313, CC Docket No. 01-338 (Oct. 4, 2004).

basis (ICB).³ If ITC^DeltaCom chooses to use non-time specific cuts during the day because it does not want to pay for overtime or if no after-hour BellSouth resources are available, then ITC^DeltaCom's customers will be without service for some undefined period of time. From the time BellSouth starts the work, until BellSouth notifies ITC^DeltaCom of completion (up to two hours after completion of the conversion) and then ITC^DeltaCom completes its LNP port process, the customer will be without service. This process takes up to several hours. This is unacceptable for customers, and it should be unacceptable to the Commission.

In addition, BellSouth does not have in place a "Batch Hot Cut" process for bulk migrations of BellSouth retail customers to CLECs. The Batch Hot Cut process that BellSouth has described in its comments is limited to conversions from UNE-P (a CLEC) to UNE-L (a CLEC). Limitations associated with the batch conversion from UNE-P to UNE-L include the following: (1) BellSouth requires the CLEC to provide an address that has been validated by the BellSouth Regional State Address Guide (RSAG) database, (2) BellSouth requires the Exchange Access Telephone Number (EATN) to be located in the same wire center, and (3) BellSouth will not handle any moves or changes with the conversion. The CLECs currently experience problems as a result of the address requirement; the CLEC will validate the address, but BellSouth rejects the address as invalid. BellSouth's requirement that the EATN be in the same wire center is an attempt to manipulate work force. In testimony before various state commissions, however, BellSouth has stated that staffing is not an issue, and that it can handle an increase in the scale of hot cuts.⁴ If staffing truly is not an issue, then BellSouth would not be attempting to manipulate the work force. BellSouth has not demonstrated that it can handle the

³ See BellSouth Comments, Exhibit BLS-2, at 7.

⁴ Direct Testimony of Kenneth L. Ainsworth, Before the Florida Public Service Commission, Docket No. 030851-TP, at 30-38 (Dec. 4, 2004).

scale of hot cuts that will occur if the Commission removes local switching from the list of network elements that must be unbundled under section 251(c)(3) of the Act. The Commission should ensure that BellSouth has a reliable and effective batch hot cut process for conversions from BellSouth's retail arm to CLECs using UNE-L or EELs.

BellSouth's batch hot cut process is purely theoretical (*i.e.*, it has not been used in the real world), and past experience demonstrates that it likely is flawed. BellSouth argues that Price Waterhouse has tested its "batch hot cut process" and that since no CLEC has chosen to be the "guinea pig" this Commission must accept as fact that BellSouth's batch hot cut process is efficient.⁵ In ITC^DeltaCom's experience, BellSouth has problems when it rolls out new OSS code and documentation. For example, in submitting orders to BellSouth, CLECs have encountered substantial defects. A defect refers to an operational or documentation problem caused by an error on *BellSouth's—not the CLEC's—part*. Specifically, a documentation error would occur when BellSouth has told the CLEC to complete a form in a particular manner, and it turns out that BellSouth's system cannot accept orders in that manner. As a result, the system will issue a defect. Attached as Exhibit 1 is a list of the current defects that BellSouth has experienced as it has rolled out changes to its OSS over the past year. Once BellSouth discovers a defect, it must go back and correct that error. As illustrated in Exhibit 1, to date, there have been numerous notifications that must be corrected. Additionally, BellSouth's batch hot cut process is not the result of collaborative project.⁶ BellSouth unilaterally cancelled or denied the majority of CLEC change requests to the proposed hot cut process due to cost or other excuses. Attached as Exhibit 3 are the cancellations or denials.

⁵ BellSouth Comments at 31.

⁶ See Email from Change Management Team, BellSouth, to CLECs (Nov. 20, 2003), provided as Exhibit 2.

The Commission must ensure that BellSouth's batch hot cut process actually works, and cannot rely on BellSouth's unfounded assertions before delisting may occur. Price Waterhouse is not the entity that will lose customers when BellSouth cancels or reschedules cut dates due to insufficient resources.

B. Ensuring Adequate Batch Hot Cut Processes

The Commission must ensure that BellSouth's batch hot cut process works going forward. To this end, at a minimum, the Commission should require BellSouth to submit monthly reports for the first twelve months of the transition period. If those performance reports indicate that BellSouth's claims about the efficacy of its batch hot cut process are erroneous or overblown, then the Commission must suspend any finding of non-impairment.

In addition to requiring performance reports, the Commission should direct each state to establish mandatory performance measurements. To date, no state in BellSouth territory has adopted such measurements for batch conversions, but carriers have proposed the following measurements that can serve as a starting point:

- **New Measure: BMRT-(Under OSS) UNE Bulk Migration-Response Time, SQM not a SEEM <99 TN's @ 95% <= 4 Business Days.**
- **P-7 CCCI-Coordinated Customer Conversions Interval-Hot Cut Duration, this is both SEEM and SQM.**
- **P-7A HCT-Coordinated Customer Conversions-Hot Cut Timeliness Percent within Interval, this is both SEEM and SQM.**
- **P-7B RT-Coordinated Customer Conversion Average Response Time just SQM.**

- **P-7C PT-Hot Cut Conversion % Provisioning Troubles Received within 5 days of Completed Service Order, just SQM.**
- **New-CNDD Non-Cordinated Customer Conversions-% Completed and Notified on Due Date, both SQM and SEEM.**

C. BellSouth Cannot Convert Non-Copper Loops Without Problems

In addition, BellSouth's hot cut process is not ubiquitous; posing another operational barrier to CLECs in the BellSouth region. BellSouth cannot cut over non-copper (*e.g.*, IDLC) loops to a loop of equal quality. Indeed, BellSouth has admitted that it is not technically feasible to convert an IDLC loop to an unbundled loop that has not undergone any additional analog to digital conversions in all cases.⁷ Each time a loop undergoes an analog to digital conversion ("A to D conversion") the quality of the loop deteriorates. Depending on the extent of degradation, the customer may not be able to use a fax or be able to dial up the Internet where there are multiple A to D conversions.⁸ BellSouth does not dispute these issues; BellSouth's response was that ITC^DeltaCom should file a New Business Request and specify the type of loop desired.⁹ However, even if ITC^DeltaCom did specify a loop, the trial test showed that BellSouth could not provide the same quality of unbundled loop to ITC^DeltaCom as that it delivered to the customer (*i.e.*, without additional A to D conversions thereby significantly affecting the

⁷ See Arbitration Petition of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications Inc., Florida Public Service Commission Docket No. 030137-TP, Direct Testimony of W. Keith Milner (May 19, 2003), attached hereto as Exhibit 4 ("Milner Florida Direct"); *see also* Surrebuttal Testimony of James Webber on Behalf of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc., Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the Federal Communications Commission's *Triennial Review Order*, South Carolina Docket No. 2003-32b-C (Mar. 31, 2004), attached as Exhibit 5.

⁸ See Arbitration Petition of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications Inc., Florida Public Service Commission Docket No. 030137-TP, Testimony of Steven Brownworth at 4 (May 19, 2003), provided as Exhibit 6.

⁹ Milner Florida Direct at 13.

customer's level of service quality). Indeed, BellSouth's witness, Mr. Keith Milner, who is also an affiant for BellSouth in this proceeding, stated in his prefiled testimony in Florida:

BellSouth agreed to ... explore some technical possibilities in an attempt to minimize or eliminate the need for Analog to Digital conversions.... To my knowledge, there simply is no technically feasible way to accomplish what DeltaCom is asking.¹⁰

Thus, the problem of obtaining a loop that is equal in quality to that which BellSouth provided itself still is unresolved. The white paper that BellSouth prepared shows that the eight solutions that BellSouth identified to address the IDLC issue are limited in applicability and do not ensure in all cases that ITC^DeltaCom (or any other carrier) can acquire a loop that is equal in quality to what BellSouth provides to itself.¹¹ At a minimum, BellSouth must provide an unbundled loop that is at least equal in quality to that which BellSouth provides itself.¹² Otherwise, CLECs will continue to face operational barriers from BellSouth's hot cut process.

The Commission must find that CLECs are impaired with respect to those IDLC loops. The Commission must require BellSouth to continue to provide unbundled local switching where CLECs are impaired due to the degraded quality of the IDLC loop delivered with additional A to D conversions until BellSouth can demonstrate that no degradation in loop quality exists. In those instances, ITC^DeltaCom should be able to obtain local switching at TELRIC pricing.

III. CLECS ARE IMPAIRED WITHOUT ACCESS TO HIGH CAPACITY LOOPS AND DEDICATED TRANSPORT

BellSouth relies in large part on its so-called "UNE Fact Report" to demonstrate that carriers are not impaired without access to high capacity loops and dedicated transport. In particular, BellSouth relies on press statements and SEC filings by ITC^DeltaCom to support its position that CLECs are not impaired without these UNEs. In doing so, BellSouth blatantly has

¹⁰ *Id.* at 12-13.

¹¹ Milner Florida Direct, Exhibit WKM-1, attached to Exhibit 4.

¹² *See* 47 C.F.R. § 51.311(b).

ignored the numerous discovery responses that ITC^DeltaCom has submitted to BellSouth in the various state proceedings held in response to the *Triennial Review Order*. Rather, BellSouth has chosen to disseminate incomplete statements about ITC^DeltaCom operations. In doing so, BellSouth has misled the Commission by taking statements out of context and presenting only half of the picture. In this section, ITC^DeltaCom responds to the statements that BellSouth has made regarding ITC^DeltaCom, and demonstrates why those statements, in particular, are insufficient for the Commission to use as support for BellSouth's claim that CLECs are not impaired without unbundled high capacity loops and dedicated transport.

In Florida, BellSouth claimed that ITC^DeltaCom provided wholesale dedicated transport on certain routes. BellSouth made this assertion based on its claim that ITC^DeltaCom supposedly had collocations in various central offices. BellSouth at first refused to acknowledge that certain collocation sites did not even belong to ITC^DeltaCom until Ms. Padgett (BellSouth witness) was deposed. In her deposition, Ms. Padgett acknowledged that BellSouth was in error with regard to counting ITC^DeltaCom as a trigger for dedicated transport in Florida.¹³ In summary, based on our review of BellSouth's comments and our knowledge of our network and offerings, BellSouth is exaggerating the amount of competition it faces for high capacity loops and transport and its assertions are unreliable.

The Commission also cannot rely on the UNE Report, which bases its findings, in part, on select news reports and SEC filings taken out of context. BellSouth, however, specifically

¹³ Ironically, BellSouth was paid to transfer the collocation sites from ITC^DeltaCom to another company and thus had full knowledge of the fact that these collocation sites belonged to another company. In her deposition, Ms. Padgett stated that BellSouth no longer considered ITC^DeltaCom as a trigger for dedicated transport in Florida. See Deposition of Shelley Padgett, Florida PSC Proceeding 030851-TP, at 92-93, provided as Exhibit 7. Yet, in this proceeding, BellSouth once again claims that ITC^DeltaCom provides wholesale dedicated transport.

fails to acknowledge that ITC^DeltaCom expressed concern regarding changes in the regulatory climate in that same SEC filing:

We cannot predict how the FCC will act in any remand proceedings resulting from the appellate court's ruling, or the extent to which the FCC's resulting decisions will be favorable or unfavorable to our business. Based on the appellate court's decision, it is likely that the availability of cost-based unbundled network elements to competitive carriers will be diminished in the new FCC permanent rules and that the overall cost to competitive carriers of using unbundled network elements will increase.¹⁴

Instead of relying on select excerpts of SEC filings, the Commission should examine the data responses produced in the state proceedings. If this Commission determines that it must rely on SEC filings or on news releases, then it should be careful to review the entire SEC filing or news release and not just the one sentence pulled out of the document. Investors have filed comments with the Commission urging the Commission not to delist high capacity loops and transport as unbundled network elements because there is not a viable substitute for BellSouth facilities in the BellSouth region.

IV. COMMERCIAL AGREEMENTS SHOULD BE FILED WITH AND APPROVED BY THE STATE COMMISSION

As numerous commenters, including state commissions, have demonstrated in this proceeding, the Commission must require BellSouth and all other ILECs to file interconnection agreements with the appropriate state commissions. As other carriers have demonstrated in their pleadings, and ITC^DeltaCom will not reiterate those arguments herein, ILECs have an obligation under the Act to file interconnection agreements, including agreements that contain rates, terms, and conditions for section 271 network elements, with the applicable state commissions. In addition to the sound legal basis for this requirement, there also are substantial policy reasons that dictate this same result.

¹⁴ ITC^DeltaCom Form 10Q SEC filing at 14 (Aug. 9, 2004) (emphasis added).

Specifically, the Commission cannot rely on BellSouth's promise that it will make commercial agreements available for inspection as support for its decision to not require ILECs to file commercially negotiated agreements. BellSouth has informed this Commission that it will make its commercial agreements available for review. BellSouth sent out a carrier notice letter stating that CLECs such as ITC^DeltaCom could review executed commercial agreements. In reality, BellSouth makes it extremely difficult to review these agreements. Furthermore, review of these so-called commercially negotiated agreements demonstrates that the agreements are nothing more than interconnection agreements by different name.

BellSouth makes the process for review of such agreements difficult. In response to BellSouth's carrier letter, ITC^DeltaCom sent a request to review the agreements to BellSouth. BellSouth then informed ITC^DeltaCom that the agreements could only be reviewed in Atlanta and no copies could be made.¹⁵ BellSouth imposed time constraints on the review of such agreements.¹⁶

Based on the agreements that ITC^DeltaCom reviewed, there is no legitimate argument that these agreements are anything other than interconnection agreements.¹⁷ The term "commercial agreement" is synonymous with the term "interconnection agreement." These agreements provide for the purchase of local switching and they should be filed and approved by the state commissions in accordance with the federal Telecommunications Act of 1996 ("Telecom Act"). Furthermore, carriers that are unable to reach an agreement should have available to them the negotiation and arbitration process outlined in the Telecom Act. Real commercial negotiations cannot occur without access to third party dispute resolution.

¹⁵ See Affidavit of Nanette Edwards ¶ 5, provided as Attachment A.

¹⁶ *Id.* ¶ 7.

¹⁷ *Id.*

V. THE BELLSOUTH/ITC^DELTACOM ARBITRATION

In this section, ITC^DeltaCom responds to statements BellSouth has made in its comments regarding characterizing the BellSouth/ITC^DeltaCom arbitration before the Tennessee Regulatory Authority (“TRA”). On page 13 of BellSouth’s comments BellSouth states “DeltaCom filed for arbitration on this issue without raising it during the negotiations.” This statement is patently false. BellSouth provided ITC^DeltaCom with language regarding a “market rate” and included a “\$14.00 per port” rate for certain MSAs. On or about January 22, 2003, ITC^DeltaCom representatives, including Jerry Watts and Nanette Edwards, among others, had a telephone conference with BellSouth representatives, Jim Maziarz and Martha Romano, among others, and one of the issues discussed was the market rate. ITC^DeltaCom did not file its arbitration petition until February of 2003. Jim Maziarz testified in a deposition that he had participated in the negotiations with ITC^DeltaCom.¹⁸ Mr. Maziarz is a product manager at BellSouth for UNE-P. In conclusion, BellSouth’s statement to this Commission that ITC^DeltaCom never discussed this issue with BellSouth prior to filing the arbitration petition is a false statement.

Moreover, as ITC^DeltaCom noted in its comments filed in response to BellSouth’s petition, BellSouth moved to strike various issues in the arbitration proceeding. At no time did BellSouth move to strike Issue 26(c), which ITC^DeltaCom clearly had specified as a request to the state commission to determine the market rate for local switching.

¹⁸ See, e.g., *Telephonic Deposition of Jim Maziarz, Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996*, Florida Public Service Commission Docket No. 030137-TP (Aug. 15, 2003), provided as Exhibit 8.

VI. CONCLUSION

For the foregoing reasons, ITC^DeltaCom respectfully requests that the Commission grant the relief requested herein.

Respectfully submitted,



Nanette Edwards
Director of Regulatory Affairs
ITC^DeltaCom Communications, Inc.
7037 Old Madison Pike
Suite 400
Huntsville, Alabama 35806

ATTACHMENT A

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**AFFIDAVIT OF NANETTE S. EDWARDS
ON BEHALF OF ITC^DELTA COM COMMUNICATIONS, INC.
D/B/A ITC^DELTA COM**

I, Nanette S. Edwards, being of lawful age and duly sworn upon my oath, depose
and state:

1. My name is Nanette S. Edwards. I am employed by ITC^DeltaCom
Communications, Inc. ("ITC^DeltaCom"), as Director of Regulatory Affairs, Senior Attorney,
and my business address is 7037 Old Madison Pile Road, Suite 400, Huntsville, Alabama 35806.

2. In my role as Directory of Regulatory Affairs, I have had extensive
experience reviewing interconnection agreements for ITC^DeltaCom. I also have participated in
negotiations and arbitrations of interconnection agreements with BellSouth on ITC^DeltaCom's
behalf.

3. BellSouth issued Carrier Notice SN91084120. In that carrier notice,
BellSouth stated that it would make available for review by other carriers the so-called
commercial agreements that it had entered into with various carriers.

4. On June 17, 2004, in response to Carrier Notice SN91084120, I requested
to review BellSouth's commercial agreements.

5. BellSouth contacted me in response to my request. BellSouth imposed time and location constraints on my ability to review the documents. BellSouth only was willing to make the agreements available for review at its headquarters in Atlanta, Georgia. For example, BellSouth explicitly refused to make these agreements available for my review at its Birmingham office. BellSouth also precludes carriers from making copies of any portion of the agreements.

6. While at BellSouth's offices, I reviewed the rates, terms, and conditions of approximately nineteen agreements.


7. These "commercial agreements" are interconnection agreements and are subject to the requirements of the Telecommunications Act of 1996.

I declare under the penalty of perjury that the facts stated herein are true and correct to the best of my knowledge, information and belief.



Nanette S. Edwards
Director - Regulatory Affairs, Senior Attorney
ITC^DeltaCom Communications, Inc.

SWORN TO and subscribed
Before me this 19th day of
October, 2004


Notary Public

My Commission Expires: 1-12-08